RECENT CASES

BAILMENTS—INNKEEPER—LIABILITY FOR DAMAGE TO AUTOMOBILE OF GUEST—Plaintiff, a guest at defendant's inn, put his car in the garage of the inn, which garage was open on one side. Due to a frost, the water in the engine froze, damaging the car. *Held,* that defendant was not liable since he was not negligent. *Winkworth v. Raven* [1931] 1 K. B. 652.

From the time of *Calye's Case*,[1] English courts have held, with but one exception,[2] that, irrespective of negligence, an innkeeper is bound to keep the goods of his guest safely.[3] He might exonerate himself only by showing that the loss was caused by the negligence of the guest himself,[4] an Act of God, or the Sovereign's enemies.[5] The court in the immediate case recognized this absolute liability, but declared that it pertained only to losses by theft, and that in cases of damage, negligence must be proved. This distinction is without precedent in English law.[6] And even in the United States, where the authorities are quite in conflict,[7] no such distinction is made.[8] Yet, when the reason of the rule is considered, the distinction appears to be sound. The marauders of old, whose existence required the innkeeper to guarantee his guests an absolute protection of their goods from robbery,[9] have given way to the less violent thieves, whose presence and opportunities in the large hotels have made the preservation of the rule wise and desirable. But neither reason, ancient or modern, is applicable to an absolute liability for damage to goods. Nor does the classical argument of collusion between innkeeper and thief have any force when the facts show a mere injury.[10]

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[1] 8 Co. 32a (1584).

[2] Dawson v. Chamney, 5 Q. B. 164 (1843).

[3] Bennett v. Mellor, 5 T. R. 273 (1793); Morgan v. Ravey, 6 H. & N. 265 (1861); Aria v. Bridge House Hotel, Ltd., 71 Sol. J. 395, 163 L. T. 465 (1927); see Robins v. Gray [1895] 2 Q. B. 501, 503, 504.

[4] Sanders v. Spencer, 3 Dyer 266b (1568); Cashill v. Wright, 6 E. & B. 891 (1856).

[5] See Morgan v. Ravey, *supra* note 3, per Pollock, J., at 277.

[6] Dawson v. Chamney, *supra* note 2, cited as authority by the court in the instant case, held that an innkeeper was not liable for an injury to a guest's horse, where the innkeeper was not negligent. The decision was based, however, not on the fact that the wrong was an injury as distinguished from a theft, but on the broader principle that an innkeeper may exonerate himself by showing he was not negligent, a doctrine inconsistent with the general rule of English authorities (*supra* note 3), and one that was frankly disapproved in Morgan v. Ravey, 6 H. & N. 265 (1861), and overruled in Day v. Bather, 2 H. & C. 14 (1863).

[7] As in England, the majority hold the innkeeper liable as an insurer. Sibley v. Aldrich, 33 N. H. 553 (1856); Hulett v. Swift, 33 N. Y. 571 (1865); Schultz v. Wall, 134 Pa. 262, 19 Atl. 742 (1890). The minority hold the innkeeper liable only if he fails to prove that he was without fault. Cutler v. Bonney, 30 Mich. 259 (1874); Howth v. Franklin, 20 Tex. 798 (1858).

[8] Shaw v. Berry, 31 Me. 478 (1850) (injury to horse); Sibley v. Aldrich, *supra* note 7 (injury to horse). But *cf.* Johnson v. Chadbourne Furnace Co., 89 Minn. 310, 94 N. W. 874 (1903), where the court modified the strict common law rule to relieve defendant in case of accidental fire.

In Metcalf v. Hess, 14 Ill. 129 (1852), the court refused to hold the innkeeper liable for the accidental death of a horse, saying, at page 130: "An innkeeper can have no motive to destroy the animal of his guest, and there is not the same reason for holding him responsible at all events for such a loss as there would be . . . for the loss of goods which had disappeared from his possession; because in the latter case he may have converted the goods to his own use, while in the former, he could gain nothing by the death of the horse." However, Illinois later dropped the distinction, requiring negligence in all cases. Johnson v. Richardson, 17 Ill. 302 (1855).

[9] BEALE, THE LAW OF INNKEEPERS AND HOTELS (1906) c. 1, § 6; c. 15, § 181; see Calye's case, *supra* note 1, at 33, where the stress is laid on the proposition that an innkeeper could not absolve himself for losses by theft, but no mention is made of injuries to goods.

[10] JONES, BAILMENTS, *95-96.

Again, viewed from the standpoint of expediency, such a distinction may anticipate and check any tendency toward a "blanket" relaxation of the absolute liability of the innkeper because of "hard" cases.[11] The *dictum* of the court,[12] however, to the effect that the guest must prove negligence on the part of the innkeeper goes further even than any American authority, the most lenient of which make the innkeeper at least *prima facie* liable, with the burden of exonerating himself by proving that the loss or injury was not due to his fault.[13] In view of the fact that it is just as difficult for the guest to prove negligence in the case of injury as in the case of theft,[14] and in view of the fact that the innkeeper with his lien is in a better position than the ordinary bailee,[15] the latter rule seems more desirable.

BANKRUPTCY—RIGHT TO ENJOIN SALE BY PLEDGEE—Bankrupt had pledged securities to a bank as collateral for a loan. The pledgee was given the power to sell the collateral at will. After bankruptcy of the pledgor, the referee sought to restrain the pledgee from selling the collateral. *Held,* that the pledgee could not sell the pledged property without leave of the bankruptcy court. *In re Henry,* 50 F. (2d) 453 (E. D. Pa. 1931).

The United States Supreme Court recently held in *Isaacs, Trustee v. Hobbs,*[1] that a court of bankruptcy could restrain foreclosure proceedings instituted after bankruptcy of the mortgagor. This ruling was founded upon the principle that title to and control of the bankrupt's property vests in the trustee in bankruptcy, and is thus placed under the exclusive custody of the bankruptcy court.[2] A strong practical reason motivates this stay of proceedings, where it is probable that a greater surplus will be realized by the trustee over and above the liens, which will accrue to the ultimate benefit of the general creditors.[3] On the contrary, if the

[11] It may be significant that at least three of the minority American jurisdictions had very "hard" cases for their first impression. Cutler v. Bonney, *supra* note 7 (accidental fire); Metcalf v. Hess, *supra* note 8; Merritt v. Claghorn, 23 Vt. 177 (1851) (accidental fire).

For what may be a similar tendency towards relaxation in the case of common carriers, *cf.* the recent case of Mercer v. Christiana Ferry Co., 155 Atl. 596 (Del. 1930), in which the court refused to hold the carrier liable for the loss of an automobile sunk without its fault, on the ground that there had been no delivery of the car, the plaintiff having merely driven it onto the ferry.

[12] At p. 657.

[13] Bowell v. Dewald, 2 Ind. App. 303, 28 N. E. 430 (1891). BEALE, *op. cit. supra* note 9, § 190 n. 35.

[14] JONES, BAILMENTS, *95-96; see Hulett v. Swift, 33 N. Y. 571, 572 (1865).

[15] Robins v. Gray [1895] 2 Q. B. 501.

[1] 282 U. S. 734, 51 Sup. Ct. 270 (1931); *cf.* Straton v. New, Trustee, 283 U. S. 318, 51 Sup. Ct. 465 (1931); *In re* Schulte-United, Inc., 49 F. (2d) 264 (C. C. A. 2d, 1931). It has been suggested in the Pittsburgh Legal Journal (August 1, 1931), that Straton v. New has a material bearing on the rule evolved in Isaacs v. Hobbs. It seems, however, that both cases can be reconciled on the ground that in Straton v. New foreclosure proceedings were commenced more than four months prior to bankruptcy, so that the state court first acquired jurisdiction.

[2] George B. Matthews & Sons v. Webre Co., 213 Fed. 396 (E. D. La. 1914); *In re* San Gabriel Sanatorium Co., 102 Fed. 310 (C. C. A. 9th, 1900); BLACK, BANKRUPTCY (4th ed. 1926) 1192.

[3] BANKRUPTCY ACT, 1898, § 2, U. S. COMP. STAT. 1901, 3420; George B. Matthews & Sons v. Webre Co., *supra* note 2, at 397; U. S. Fidelity and Guaranty Co. v. Bray, 225 U. S. 205, 32 Sup. Ct. 620 (1912); *In re* Booth, 96 Fed. 943 (D. C. Ga. 1899). BLACK, BANKRUPTCY (4th ed. 1926) 1192, "So also, where it appears that it would be for the interest of the creditors at large to have mortgaged real estate taken by the trustee and administered with the remainder of the assets, preserving the lien of the secured creditor, the court of bankruptcy has jurisdiction to order the trustee to take possession of the property, and to enjoin the secured creditor from selling it or otherwise interfering with it."

unpaid mortgage lien greatly exceeds the market value of the property,[4] permission to commence foreclosure proceedings is not withheld. The instant court deemed the problem before it settled conclusively by the decision of *Isaacs, Trustee v. Hobbs*. Considering that the factor of "control" was so strongly emphasized in that case,[5] an injunction against foreclosure upon realty might co-exist with an unrestrained sale of personalty, since there is relatively a much smaller degree of actual control over personal property in the bankruptcy court. Courts have recognized this distinction, and many will not enjoin the pledgee in the absence of fraud.[6] In most instances where the bankruptcy court refrained from intervention, the security was of lesser value than the amount of the lien.[7] One court, however, has intimated that even the possibility of the pledgee procuring a surplus is immaterial.[8] The opinion in the case at bar does not reveal the value of the pledge as compared to the size of the lien,[9] but in an earlier case which likewise did not disclose that material fact, the pledgee was permitted to sell without interference by the court.[10] Practically, the only detrimental effect of restraining the sale is a delay for a reasonable period, during which the trustee may survey the situation to prevent possible fraud and to seek the highest sales price.[11] But when it is considered that a pledgee, especially a bank, advances money upon a pledge very often only because of the ease of liquidation, one must doubt the wisdom of adopting such a rule, unless there is a sufficient excess in value above the amount of the lien to protect adequately the pledgee, and it is clearly shown that a material advantage will accrue from restraining the sale.

BANKRUPTCY—SURETYSHIP—PROVABILITY OF CONTINGENT LIABILITIES—The indorser of a promissory note became bankrupt before the note became due. The holder of the note filed a claim against the bankrupt estate. *Held*, that the claim should be allowed since it was a "provable debt". *Maynard, Administrator v. Elliot*, 283 U. S. 273, 51 Sup. Ct. 390 (1931).

[4] *In re* Schulte-United, Inc., *supra* note 1, at 264; *In re* Parrino, 50 F. (2d) 611 (E. D. N. Y. 1931).

[5] *Supra* note 1, at 737, 51 Sup. Ct. at 271.

[6] Mercer Nat. Bk. v. White's Executor, 236 Ky. 128, at 132, 32 S. W. (2d) 734, at 737 (1930), citing with approval Hiscock v. Varick Bk., 206 U. S. 28 (1907), "The pledgee has a special property in the thing pledged which entitles him to the possession, to protect which he may maintain detinue, replevin, or trover, and the interest of the pledgor is not subject to execution; and the bankruptcy court will not interfere with a sale by the pledgee of the thing pledged, under power of sale given by the terms of his contract, when there is no claim that such power is exercised in a fraudulent or oppressive manner." BLACK, BANKRUPTCY (4th ed. 1926) 1196.

[7] Mercer Nat. Bk. v. White's Executor, *supra* note 6, at 133; Griffin v. Smith, 177 Cal. 481, 171 Pac. 92 (1918); *In re* Peacock, 178 Fed. 851 (E. D. N. Car. 1910).

[8] See Griffin v. Smith, *supra* note 7, at 483, 171 Pac. at 93, "But if, overlooking the defective form of pleading we take it as intended to aver that a substantial surplus above plaintiff's claim might be realized if the sale were postponed, the allegation is still insufficient. The plaintiff, as pledgee, has a matured and present right to realize upon his security." But *cf. In re* Cobb, 96 Fed. 821 (1899) (pledgee must surrender the collateral to the trustee in any case).

[9] It seems to have been admitted by both parties that the collateral was worth more than the amount of the lien.

[10] *In re* Mayer, 157 Fed. 836 (C. C. A. 2d, 1907). This case also pointed out that the only section of the Bankruptcy Act which referred to the disposition of collateral, § 57 (h), was of no aid since it is almost universally conceded that this section only fixes a mode for evaluating the securities held by secured creditors.

[11] Thus, the trustee may be able to sell the pledged stock in conjunction with another block of this stock which together constitute a controlling interest in a corporation. Conversely, in certain situations, by selling the pledged stock in small quantities, the trustee may secure a better price by avoiding a glutting of the market.

The instant case has quelled the dissension which has surrounded this point since the passage of the present Bankruptcy Act.[1] This Act does not expressly mention the provability of contingent liabilities, as did the previous act, which provided that they should be provable debts.[2] Many courts have held that contingent liabilities are not provable debts under this new act. Some of these courts base their decision on the reasoning that Congress meant to exclude such claims by omitting mention of them,[3] while others[4] rely upon their interpretation of § 63a of the Act, which section defines "provable debts". These latter courts contend that subdivision 4 of this section, which lists as provable ". . . debts founded upon an open account, or upon a contract express or implied," must be considered in the light of subdivision 1 of the same section, which lists as provable, "debts" which are "a fixed liability . . . absolutely owing at the filing of the petition. . . ." The better opinion, however, follows the view that these subdivisions are distinct provisions, and independent of each other.[5] Under this interpretation contingent claims are provable even though they are not matured at the "time of bankruptcy". This view has been adopted by the leading text writers.[6] As has been pointed out by the court in the case of *In re Buzzini & Co.*,[7] the claim must be proven within the statutory period, but, as is frequently the case in bankruptcy, the liquidation would be delayed until the maturity of the claim. The holding of the instant case supports this view, yet the criticism advanced by Holbrook[8] still seems applicable, ". . . it would be infinitely better if the statute were so amended as to bring about this desirable result without too great a strain upon the language of the act."

BILLS AND NOTES—NEGOTIABILITY—ENTRY OF JUDGMENT BEFORE MATURITY WITHOUT STAY OF EXECUTION—Defendant issued a note payable ninety days after date to *B*, containing a power of attorney to confess judgment "at any time after the date, without stay of execution". The plaintiff, who was indorsee of this note, obtained thereon a judgment which the defendant seeks to vacate. *Held*, that the note being non-negotiable, the indorsement according to statute was not sufficient to entitle the holder to enter judgment thereon. *Wooleyhan v. Green*, 155 Atl. 602 (Del. 1931).

Most courts hold that a note which permits entry of judgment before maturity is non-negotiable.[1] One reason given for this rule is that the due date is indefinite.[2] This conclusion is reached either on the ground that the note is inconsistent in that at one place it states judgment can be entered immediately and in another place it says the note is due in the future[3] or on the ground that

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[1] ACT OF JULY 1, 1898, 30 STAT. 544 (1898), 11 U. S. C. §§ 1-112 (1926).
[2] ACT OF MARCH 2, 1867, 14 STAT. 517, 525 (1867) § 19.
[3] See *In re* Mullings Clothing Co., 238 Fed. 58, 67 (C. C. A. 2d, 1916); *In re* American Vacuum Cleaner Co., 192 Fed. 939 (D. N. J. 1911).
[4] *In re* Roth v. Appel, 181 Fed. 667 (C. C. A. 2d, 1910); First National Bank v. Elliot, 19 F. (2d) 426 (C. C. A. 6th, 1927).
[5] Moch v. Market St. National Bank, 107 Fed. 897 (C. C. A. 3d, 1901); *In re* Smith, 146 Fed. 923 (D. R. I. 1906).
[6] 2 REMINGTON, BANKRUPTCY (3d ed. 1923) § 777; COLLIER, BANKRUPTCY (12th ed. 1921) 963.
[7] 183 Fed. 827, 829 (S. D. N. Y. 1910).
[8] *A Surety's Claim Against His Bankrupt Principal Under the Present Law* (1912) 60 U. OF PA. L. REV. 482, 498.

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[1] Volk v. Shoemaker, 229 Pa. 407, 78 Atl. 933 (1911); First National Bank v. Russel, 124 Tenn. 618, 139 S. W. 734 (1911); Muender v. Muender, 182 Wis. 417, 196 N. W. 773 (1924).
[2] First National Bank v. Russel, *supra* note 1.
[3] See instant case at 604. *Cf.* (1929) 78 U. OF PA. L. REV. 260 (inconsistency in amount).

the due date is dependent upon the caprice of the holder.[4] A second reason given is that the *Negotiable Instruments Law* [5] which provides that the negotiability of an instrument is not impaired by a provision which permits a confession of judgment at or after maturity, was meant to make a note of this nature non-negotiable. Other courts,[6] however, hold that this section is not controlling and was meant only to show some of the things which do not impair negotiability. A few courts reach the conclusion that the note is negotiable by saying, either that the power of attorney was not "authorized or contemplated by our law" and so was never any part of the note,[7] or, that though the power of attorney is non-negotiable the note itself still remains negotiable.[8] It has been suggested [9] that this type of instrument is non-negotiable for commercial reasons since its circulation is retarded by the fact that the due date is dependent on the whim of the holder. The inconsistency of this view is seen in the fact that there are no commercial objections to an ordinary demand instrument [10] or one due within a certain definite period.[11] Especially is this true where there is no provision "without stay of execution" [12] since here the power is merely one of security and not for purposes of execution before maturity.[13] There seems, however, to be two other reasons for non-negotiability, one based on a social factor and the other on the intention of the parties. The former is the desire of the courts to protect dependent borrowers who have been driven to a harsh bargain. The latter is that it could not have been the reasonable intention of the parties [14] that a note with such a provision should be negotiable since an inopportune entry of judgment by a stranger would be likely to destroy the entire fabric of the maker's business.[15]

CONFLICT OF LAWS—CONTRACT OBLIGATIONS—EXTENT OF RECOVERY FOR BREACH—Defendant contracted in Massachusetts to pay for his daughter's attendance at plaintiff's school in Massachusetts for the full school year but withdrew her in December, leaving unpaid the second term charges which, by the contract terms, fell due in January and February. Plaintiff brought assumpsit in Michigan for the entire amount unpaid. *Held,* that plaintiff could recover only compensatory damages, the Michigan remedy for breach of an executory contract. *Mount Ida School for Girls v. Rood,* 235 N. W. 227 (Mich. 1931).

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[4] Wisconsin Yearly Meeting of Freewill Baptists v. Babbler, 115 Wis. 289, 91 N. W. 678 (1902). This is a principle which runs through negotiable instruments law for the courts have always attempted to render non-negotiable all instruments, the due dates of which are dependent on the caprice of the holder.

[5] N. I. L. § 5.

[6] Jones v. Turner, 249 Mich. 403, 228 N. W. 796 (1930).

[7] Tolman v. Janson, 106 Ia. 455, 76 N. W. 732 (1898).

[8] Osborn v. Hawley, 19 Ohio 130 (1850). Another court arbitrarily says that the time is not so uncertain as to render the note non-negotiable. Gelbach v. The Carlinville National Bank, 83 Ill. App. 129 (1898) (after or before passage of N. I. L.).

[9] (1919) 32 HARV. L. REV. 747, 753; (1925) 3 WIS. L. REV. 105.

[10] N. I. L. § 7.

[11] N. I. L. § 4.

[12] See Johnson v. Phillips, 143 Md. 16, 22, 122 Atl. 7, 9, where the court held the note non-negotiable even though this phrase was omitted.

[13] Shapiro v. Malarkey, 278 Pa. 78, 122 Atl. 341 (1923).

[14] *Cf.* Gray v. Gardner, 12 D. & C. 449 (Pa. 1929), where the court was influenced by the intention of the parties; (1929) 78 U. OF PA. L. REV. 258.

[15] First inferred from Overton v. Tyler, 3 Pa. 346 (1846).

The law of the *forum* undoubtedly determines the remedy available to a suitor,[1] but this rule is meaningless without restricting "remedy" to one of its two common meanings,—the reparation for the wrong, or the mode of redress.[2] It is in the latter sense that the word is now generally used in connection with questions of conflict of laws.[3] By the great weight of authority it is recognized that the measure of damages for breach of contract is a matter pertaining to the substance of the right and not to the remedy, and must be determined by the *lex loci*,[4] not by the *lex fori*.[5] Under the law of Massachusetts the promise in suit would be construed as independent, and plaintiff would be permitted to recover the full contract price.[6] Since the validity of the contract was not in question, it would seem that the only question before the court was the determination of the measure of damages. The court, however, expressly excluded that question from consideration and said the issue to determinate is the remedy open to plaintiff—his right to reparation.[7] In determining what this "remedy" should be, the court had to answer one question only—whether the promise to pay was dependent or independent.[8] This question is one of contract construction;[9] and the construction, or legal effect, of a contract, is determined by the *lex loci contractus*.[10] In ruling that this promise was dependent the court did not follow the Massachusetts rules of construction,[11] but relied on Michigan authority.[12] Thus even if it is granted that a question of "remedy" is involved, the promise was independent where made and hence the court should have granted full recovery which is its remedy for the breach of an independent promise.

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[1] Scudder v. Union Nat. Bank, 91 U. S. 406, 23 L. Ed. 245 (1875); Miller v. Hilton, 189 Mich. 635, 155 N. W. 574 (1915).

[2] See GOODRICH, CONFLICT OF LAWS (1927) 158; Note (1930) 14 MINN. L. REV. 665.

[3] GOODRICH, *op. cit. supra* note 2.

[4] *Lex loci* is used in this connection to mean either the *lex loci contractus* or the *lex loci solutionis* in contradistinction to the *lex fori*.

[5] Atwood v. Walker, 179 Mass. 514, 61 N. E. 58 (1901); Brown v. Camden etc. Ry., 83 Pa. 316 (1877); CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1931) § 396D; GOODRICH, CONFLICT OF LAWS (1927) 183; SEDGWICK, DAMAGES (9th ed. 1912) 2758; Note (1930) 78 U. OF PA. L. REV. 640; (1930) 43 HARV. L. REV. 1307. But see Wooden v. Western N. Y. R. R., 126 N. Y. 10, 15, 26 N. E. 1050, 1051 (1891); *cf* (1909) 58 U. OF PA. L. REV. 95, 98.

[6] International Textbook Co. v. Martin, 221 Mass. 1, 108 N. E. 469 (1915). In construing this type of promise the Massachusetts court applies the first rule of Serjeant Williams in his note to *Pordage v. Cole*, 1 Saund. 319, 320, 85 Repr. 449, 451 (1607).

[7] "Clearly the question is one of remedy only, not one relating to the measure of damages; and the remedy is governed by the *lex fori*." At page 229. The only explanation of this language seems to be that the court used, in the same sentence, both meanings of the word "remedy", and said, in effect, "the question is one of remedy (the right to reparation); and the remedy (mode of redress or procedure) is governed by the *lex fori;* therefore the right to reparation is governed by the *lex fori*." The court experienced the same confusion as to the meaning of "remedy" in *School of Commerce v. Stroud*, 248 Mich. 85, 226 N. W. 883 (1929); criticised in Note (1930) 14 MINN. L. REV. 665 and Note (1930) 78 U. OF PA. L. REV. 640. Wiest, J., dissenting, recognized that the question was one of damages and stated that the *lex loci* should prevail. The court was probably forced into the instant decision by the holding in the *Stroud* case.

[8] The remedy—or measure of damages—in Michigan for the breach of an *independent* promise is assumpsit on the promise: *National Cash Register Co. v. Dehn*, 139 Mich. 406, 102 N. W. 965 (1905). The court was not confronted with a conflict of remedies of two states.

[9] Loud v. Pomona Land & Water Co., 153 U. S. 564, 14 Sup. Ct. 928 (1893); Lippincott v. Low, 68 Pa. 314 (1871).

[10] Walker v. Lovitt, 250 Ill. 543, 95 N. E. 631 (1911); Amos v. Kelley, 240 Mich. 257, 215 N. W. 397 (1927); CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1931) § 376A.

[11] By statute in Michigan, the common law of a foreign state is a matter for judicial notice: MICHIGAN COMP. LAWS 1929, § 14181.

[12] International Textbook Co. v. Jones, 166 Mich. 86, 131 N. W. 98 (1911).

CONFLICT OF LAWS—TORTS—ACTION ON FOREIGN STATUTE—Plaintiff, after paying compensation to *X*'s beneficiaries, under a policy of compensation insurance issued to *X*'s employer, brought this action in 1930 in Maryland to enforce liability for *X*'s death in Texas in 1928. The applicable laws of Texas [1] and Maryland [2] differ as to: 1. time limitation for bringing the action, 2. measure of damages, 3. in whose name the action may be brought, 4. persons entitled to sue, 5. compromise by the parties. *Held,* that plaintiff could not sue on the Texas statute in Maryland because of dissimilarities regarding machinery provided for enforcement. *London Guarantee & Accident Co. et al. v. Balgowan S. S. Co. et al.,* 155 Atl. 334 (Md. 1931).

American decisions differ as to the enforcement of a foreign death statute, although few, if any, have denied the right to take jurisdiction in every circumstance.[3] Some courts predicate the right of recovery in the *forum* on the existence of a statute there similar to the one of the state where the injury occurred.[4] This is but little more liberal than the English rule which allows recovery for a tort only if the act is a tort by English law.[5] Other decisions say that the foreign statute will be enforced if it does not conflict with the public policy of the *forum,*[6] giving no indication, however, of what "public policy" means. Many courts have enforced foreign statutes dissimilar to their own.[7] Some of the later cases are more liberal in enforcing foreign statutes, saying that for the court to refuse jurisdiction the foreign law must be contrary to the morals or the welfare of the people of the *forum.*[8] These decisions, which are approved by leading text writers,[9] mark a step toward greater clarity and stability. The holding of the instant case is in conformity with some authorities,[10] including a very recent

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[1] TEX. REV. CIV. STAT. (1925) tit. 77, arts. 4671-4678 (death statute); *ibid.* tit. 130, art. 8307, § 6a (compensation law).

[2] MD. ANN. CODE (Bagby, 1924) art. 67, pars. 1 and 2 (death statute); *ibid.* art. 101, par. 58 (compensation law).

[3] It is true that the court, in Hyde v. Wabash, St. L. & P. R. R., 61 Iowa 441, 444, 16 N. W. 351, 352 (1883) said, "Even where a right of action is given by a statute of the state where the injury occurred, it has been held that no court, except those of such state, can enforce the law." But in Boyce v. Wabash R. R., 63 Iowa 70, 18 N. W. 673 (1884), the same court, however, criticized the former statement and expressly decided that a cause of action arising under the statutes of one state, could be enforced in another if the two statutes were similar.

[4] Tex. & Pac. R. R. v. Cox, 145 U. S. 593, 12 Sup. Ct. 905 (1892); Burrel v. Fleming, 109 Fed. 489 (C. C. A. 5th, 1901).

[5] Phillips v. Eyre, L. R. 4 Q. B. 225 (1869).

[6] Burns v. Grand Rapids R. R., 113 Ind. 169, 15 N. E. 230 (1888); Van Doren v. Pennsylvania R. R., 93 Fed. 260 (C. C. A. 3d, 1899).

[7] It has been held that the following differences will not defeat the jurisdiction: (1) Measure of damages, Southern R. R. v. Decker, 5 Ga. App. 21, 62 S. E. 678 (1908). (2) Limitation of damages, Hanna v. Grand Trunk R. R., 41 Ill. App. 116 (1891). (3) Persons entitled to sue, Wooden v. West. N. Y. & Pa. R. R., 126 N. Y. 10, 26 N. E. 1050 (1891). *Contra:* Lower v. Segal, 59 N. J. L. 66, 34 Atl. 945 (1896); *cf.* Matheson v. Kansas City, Ft. S. & M. R. R., 61 Kan. 667, 60 Pac. 747 (1900) (jurisdiction defeated because of differences in damages coupled with penal characteristics of foreign statute, plus differences in persons). (4) Time limitation, Weaver v. Baltimore & Ohio R. R., 21 D. C. 499 (1893).

On the other hand, jurisdiction has been refused because there was no death statute in the *forum,* Texas & Pac. R. R. v. Richards, 68 Tex. 375, 4 S. W. 627 (1887); also because the foreign state would not reciprocally enforce the death statute of the *forum,* Wabash R. R. v. Fox, 64 Ohio St. 133, 59 N. E. 888 (1901).

[8] Dennick v. Cent. R. R. of N. J., 103 U. S. 11 (1880); Lauria v. E. I. du Pont de Nemours & Co., 241 Fed. 687 (E. D. N. Y. 1917); Loucks v. Standard Oil Co. of N. J., 224 N. Y. 99, 120 N. E. 198 (1918) (leading case); CONFLICT OF LAWS RESTATEMENT (Am. L. Inst. 1931) § 620.

[9] GOODRICH, CONFLICT OF LAWS (1927) 209; MINOR, CONFLICT OF LAWS (1901) 493; STORY, CONFLICT OF LAWS (8th ed. 1865) § 625, n. a.

[10] CONFLICT OF LAWS RESTATEMENT, *supra* note 8, at § 631. See Note (1931) 79 U. OF PA. L. REV. 1112.

Pennsylvania case [11] where, as here, the time limitation that applied to death statute suits in the *forum* had elapsed.[12] The language of the decision, however, seems to indicate that the result would have been the same even if the suit had been brought within the time limitation of the *forum,* and hence to all intents and purposes the court is still adhering to an extremely conservative view.

CONSTITUTIONAL LAW—DELEGATION OF LEGISLATIVE POWER TO THE PEOPLE—An act,[1] providing for jury service by women, contained a provision for a general referendum before it might take effect. At the election specified, a majority of the votes cast was in favor of the proposition. *Held,* that the act was unconstitutional as a delegation of legislative power. *People ex rel. Thompson v. Barnett,* 176 N. E. 108 (Ill. 1931).

It is usually said that the law-making power of the legislature cannot be delegated to any other body or authority,[2] since the constitution vests that right in the legislature alone.[3] Most courts hold that this rule renders statutory provisions requiring the approval of the electorate before a measure becomes a law invalid.[4] Justice Holmes, however, in a dissenting opinion, has suggested that since the legislature is the agent of the people, "it is allowed to exercise its discretion by taking the opinion of its principal if it thinks that course to be wise." [5] Frequently, laws applicable to a particular restricted locality are distinguished from those of a general character and held valid.[6] These local option laws, though their enforcement is dependent upon the approval of the voters of the locality affected, are considered measures of local self-government which the constitution is to be construed as permitting.[7] Some courts affirm the non-delegability of legislative power to the people, but avoid the conclusion that a popular referendum is unconstitutional by saying that the law is in fact made by the legislature, that it is merely the enforcement which is conditional upon a

[11] Rosenzweig v. Heller, 302 Pa. 279, 153 Atl. 346 (1931).

[12] The general Statute of Limitations of Texas places the time limitation at two years, TEX. REV. CIV. STAT. (1925) tit. 91. The Maryland death statute says the action must be brought within one year, MD. ANN. CODE, *supra* note 2, at art. 67, par. 2.

[1] ILL. REV. STAT. (Cahill, 1929) 1614.

[2] 1 COOLEY, CONSTITUTIONAL LIMITATIONS (8th ed. 1927) 224. An important exception is with reference to the delegation of powers to local governments. The rule of non-delegability has also been qualified to permit the granting of discretionary authority to executive and administrative officers to determine when and how the powers legislatively conferred are to be exercised, or the manner in which the requirements of the statutes are to be met and the rights therein created to be enjoyed. 3 WILLOUGHBY, CONSTITUTIONAL LAW OF THE U. S. (2d ed. 1929) 1636-37. For history and scope of general rule, see Duff and Whiteside, *Delegata Potestas Non Potest Delegari* (1929) 14 CORN. L. Q. 168.

[3] ILL. CONST. OF 1870, art. 4, § 1.

[4] Opinion of the Justices, 160 Mass. 586, 36 N. E. 488 (1894); Barto v. Himrod, 8 N. Y. 483 (1853); WILLOUGHBY, *op. cit. supra* note 3, at 1651.

[5] Dissenting opinion in Opinion of the Justices, *supra* note 4, at 594. This view is endorsed by COOLEY, *op. cit. supra* note 2, at 239n.

[6] WILLOUGHBY, *op. cit. supra* note 3, at 1652n; OBERHOLTZER, REFERENDUM, INITIATIVE AND RECALL IN AMERICA (1912) 200. Local option laws are held valid in People *ex rel.* Unger v. Kennedy, 207 N. Y. 533, 101 N. E. 442 (1913); Cincinnati, W. & Z. R. R. Co. v. Commissioners, 1 Ohio St. 77 (1853); Locke's Appeal, 72 Pa. 491 (1873). *Contra:* Rice v. Foster, 4 Harrington 479 (Del. 1847).

[7] The argument advanced is that since the system of local self-governments is so deeply rooted in our political philosophy, antedating the adoption of constitutions, the principles of local self-government were intended to be incorporated into these constitutions by general implication. For an exposition and destructive criticism of this theory, see McBain, *The Doctrine of an Inherent Right of Local Self-Government* (1916) 16 COL. L. REV. 190, 299. From his conclusions it follows that the distinction mentioned between laws of local application and those of a general character is false.

favorable vote of the people.[8] Although the enforcement of legislation can be made contingent upon some designated future occurrence,[9] it would seem that a popular vote cannot be construed as such a contingency,[10] since the substance of the transaction is that the law ultimately owes its force to the votes of the people. The instant case, which rejects the contingency theory, is in accord with the majority view in regard to the reference of legislation to the approval of the entire electorate of the state.

CONSTITUTIONAL LAW—FREEDOM OF SPEECH AND THE PRESS—The defendant newspaper was enjoined from further publication, in accordance with a statute,[1] because in certain previous issues it had accused certain city officials of inefficiency and of complicity in crime with gangsters. *Held,* that the statute was unconstitutional, as an invasion of the liberty guaranteed by the Fourteenth Amendment, since it imposed a restraint prior to publication. *Near v. Minnesota,* 283 U. S. 697, 51 Sup. Ct. 625 (1931).

It becomes increasingly obvious that constitutional guaranties in an organized society are not of absolute rights,[2] but the perplexing question still remains which limitations upon those guaranties are proper and which improper. Thus, punishment for contempt of court,[3] and the exclusion of obscene,[4] fraudulent,[5] seditious,[6] and defamatory[7] matter from the mails have been judicially declared not to violate the freedom of speech and the press. The constitutionality of a given restriction would seem to involve vague considerations of social utility and expediency, as affected by the elastic factors of time and place.[8] In the instant case the Court, while recognizing the legitimacy of the above limitations, takes as its thesis that the liberty of speech and the press is within the general guaranty of liberty in the Fourteenth Amendment,[9] and subscribes to Blackstone's definition

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[8] People *ex rel.* Kennedy; Locke's Appeal, both *supra* note 6; State v. Parker, 26 Vt. 357 (1855).

[9] The Brig Aurora, 17 Cranch 382 (U. S. 1813); Home Ins. Co. v. Swigert, 104 Ill. 653 (1852).

[10] Brauner v. Supervisors, 141 Md. 586, 119 Atl. 250 (1922); Opinion of the Justices; Barto v. Himrod, both *supra* note 6. Note the result reached in Santo v. State, 2 Iowa 165 (1885), where the court held that the provision making enforcement contingent upon a popular referendum was unconstitutional, but that the rest of the act was valid, and in force when approved by the governor. Is this not contrary to the obvious intent of the legislature?

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[1] Session Laws of Minn., 1925, c. 285: "Any person who shall publish, etc. . . . a malicious, scandalous and defamatory newspaper, magazine or other periodical is guilty of a nuisance, and all persons guilty of such nuisance may be enjoined, as hereinafter provided".

[2] Gitlow v. N. Y., 268 U. S. 652, 45 Sup. Ct. 625 (1924); State *ex rel.* LaFollette v. Kohler, 200 Wis. 518, 228 N. W. 895 (1930); CORWIN, THE CONSTITUTION AND WHAT IT MEANS TODAY (1930) 95; Goodrich, *Does the Constitution Protect Free Speech?* (1921) 19 MICH. L. REV. 487.

[3] Patterson v. Colorado, 205 U. S. 454, 27 Sup. Ct. 556 (1906); Dale v. State, 198 Ind. 110, 150 N. E. 781.

[4] Tyomies Pub. Co. v. U. S., 211 Fed. 385 (C. C. A. 6th, 1914); Clark v. United States. 211 Fed. 916 (C. C. A. 8th, 1914).

[5] Public Clearing House v. Coyne, 194 U. S. 497, 24 Sup. Ct. 789 (1903).

[6] Masses Pub. Co. v. Patten, 246 Fed. 24 (C. C. A. 2nd, 1917).

[7] Warren v. United States, 183 Fed. 718 (C. C. A. 8th, 1910).

[8] Thus, the various Espionage Acts, which were passed during the late war, were uniformly upheld. Debs v. U. S., 249 U. S. 211, 39 Sup. Ct. 252 (1918); Schaefer v. U. S., 251 U. S. 466, 39 Sup. Ct. 259 (1919); Schenck v. U. S., 249 U. S. 47, 39 Sup. Ct. 247 (1918).

[9] Principal case at 707.

thereof,[10] *i. e.* there shall be no restraint prior to publication. This decision, taken together with that in the recent case of *Stromberg v. California,*[11] which held unconstitutional a statute making it a felony *inter alia* to display a red flag as a symbol of opposition to organized government, would seem to indicate a consistency of liberal *Weltanschauung* in the personnel of the present Supreme Court bench. In that case the Court pointed out that it is a privilege of citizens of the United States to offer, and to teach the doctrine of, opposition to organized government, so long as violence is not employed or counseled.[12] The principal decision commends the adverse criticism of public officials as being of great social utility,[13] a view which is consistent with the most advanced social principles.[14] Although these two recent cases [15] are by no means a definitive exegesis of the constitutional guaranties of freedom of speech and the press, they go a long way toward giving the non-conformist in public affairs, who may be as "high-minded and patriotic as his more conservative neighbor, at least a peace-time voice in the public forum.[16]

CRIMINAL PROCEDURE—NEW TRIAL—FUNCTION OF APPELLATE JURISDICTION—Defendant was convicted of murder in the second degree. The Supreme Court affirmed the judgment, although two of the five justices concluded that the trial court had erred in the decision of questions of law arising during the course of the trial, and a third judge decided that there was error in instructing the jury. The defendant was granted a rehearing. *Held,* that the judgment should be reversed. *State v. Le Duc,* 300 Pac. 919 (Mont. 1931).

Several cases declare the primary purpose of an appellate tribunal is the determination of each assignment of error as it is brought before the court.[1] Each specification involves a separate and distinct point of law and must necessarily be settled upon its own merits. The judgment will be reversed only if a majority of the justices agree upon some particular ground for new trial. On the other hand, the greater number of the cases take the view of the principal case and hold that the main function of an appellate court is to decide upon the correctness of the verdict.[2] The assignments of error are considered as a whole, and if the majority of the court conclude that the trial court erred, the judgment will be reversed.[3] But this obviously leads to curious consequences. The judge at the second trial may be required to decide on the same questions as were presented in the first trial. Since a majority of the appellate justices found that the

[10] "Every freeman has an undoubted right to lay what sentiments he pleases before the public; to forbid this, is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequence of his own temerity". 4 BL. COMM. *151; principal case at 720, 51 Sup. Ct. at 632.

[11] 283 U. S. 359, 51 Sup. Ct. 532 (1931).

[12] At 369, 51 Sup. Ct. at 535; see CHAFFEE, FREEDOM OF SPEECH (1920) 209 *et seq.*

[13] At 719, 51 Sup. Ct. at 632.

[14] Veeder, *Freedom of Public Discussion* (1910) 23 HARV. L. REV. 413.

[15] For an interesting discussion of the principal case and the Stromberg case, see Foster, *The 1931 Personal Liberties Cases* (1931) 9 N. Y. U. L. Q. REV. 64.

[16] Note (1916) U. OF PA. L. REV. 170.

[1] *In re* McNaughton's Will, 138 Wis. 179, 118 N. W. 997 (1909); Cook v. Drew, 3 Stew. & Port. 392 (Ala. 1833); see Legal Tender Cases, 52 Pa. 9, 101 (1866). See the dissenting opinion in Browning v. State, 33 Miss. 47 (1857).

[2] Browning v. State, *supra* note 1; Smith v. United States, 30 U. S. 292 (1831); Pollock v. Hennicke Co., 64 Ark. 180, 46 S. W. 185 (1897).

[3] "I believe that each of the majority members should have applied the rule that 'a wrong reason for a decision does not invalidate it' (Ebaugh v. Burns, 65 Mont. 15, 24, 210 Pac. 892, 896 (1922)) to the decision of the other, and thus become the actual majority without yielding the honest conviction of any one of them to a mere rule of procedure." Matthews, J., in principal case at p. 937.

trial judge ruled correctly on each point he is bound to render his decisions exactly as before, and again there would be ground for reversal.[4] The view is most paradoxical for, in effect, the appellate court is declaring that the trial judge did not err, and at the same time is reversing the judgment. But, as the court in the instant case points out, this is to be preferred to the condemnation of defendant, who might be innocent, to twenty-five years' imprisonment.

EQUITY—BUILDING RESTRICTIONS—TERMINATION BY ACQUIESCENCE—LACHES—Plaintiff brought a bill in 1930 to enjoin defendant from erecting a new church on lots a short distance from plaintiff in a plan of 395 lots restricted to dwellings until 1944. Defendant had built a temporary wooden structure in 1922 and has used it since as a church without objection. In 1927 and 1928 defendant published notices of an intended larger brick building. Plaintiff objected in 1928, but defendant's pastor secured over 100 waivers by residents and started excavations. The lower court enjoined the erection of the new structure, but permitted the present one to remain. *Held,* that defendant should not be enjoined in the erection of the brick building. *Cherry v. Board of Home Missions of Reformed Church,* 236 N. W. 841 (Mich. 1931).

Building restrictions, provided they are reasonable and do not unduly hinder the free alienation of property, are enforced by the courts.[1] These restrictions may forbid the erection of churches,[2] as well as other structures.[3] Equity will not interfere to enforce restrictive covenants when conditions in the locality are altered.[4] Nor will it enforce covenants where the general plan has been abandoned.[5] Other available defenses are those of acquiescence[6] and laches.[7] A complainant may not obtain equitable relief when his conduct in not objecting to a violation may fairly be construed as an acquiescence to it,[8] but this acquiescence will not destroy his right to obtain an injunction preventing an extension of the violation.[9] Similarly acquiescence to one violation will not be construed as acquiescence to another.[10] In the instant case therefore it cannot be said that there was an acquiescence in the erection of the permanent structure, particularly since it was larger. The defendant, however, had the additional defense of

[4] As said by Handy, J., in his dissenting opinion in Browning v. State, *supra* note 1, "such would be the strange and anomalous attitude of the case, *ad infinitum,* as often as it should be tried below, and brought here under the same state of facts."

[1] Compton Hill Improvement Co. v. Strauch, 162 Mo. App. 76, 141 S. W. 1159 (1911); Thompson v. Diller, 161 App. Div. 98, 146 N. Y. Supp. 438 (1914).

[2] Scott Co. v. Roman Catholic Archbishop of Ore., 83 Ore. 97, 163 Pac. 88 (1917); Johnson v. Mt. Baker Park etc. Church, 113 Wash. 458, 194 Pac. 536 (1920). *Contra:* Tucker v. Immanuel Baptist Church, 119 Kan. 30, 237 Pac. 654 (1925); see Mechling v. Dawson, 234 Ky. 318, 321, 28 S. W. (2d) 18, 19 (1930).

[3] Thompson v. Langan, 172 Mo. App. 64, 154 S. W. 808 (1913) (hotel); Hepburn v. Long, 146 App. Div. 527, 131 N. Y. Supp. 154 (1911) (private garage); Chambers v. Foley, 245 Pa. 164, 91 Atl. 350 (1914) (theater).

[4] Boston Baptist Social Union v. Boston U., 183 Mass. 202, 66 N. E. 714 (1903); Bates v. Logeling, 137 App. Div. 578, 122 N. Y. Supp. 251 (1910); Starkey v. Gardner, 194 N. C. 74, 138 S. E. 408 (1927).

[5] Loud v. Pendergast, 206 Mass. 122, 92 N. E. 40 (1910); Sanford v. Kerr, 80 N. J. Eq. 240, 83 Atl. 225 (1912).

[6] Sayers v. Collyer, L. R. 28 Ch. Div. 103 (1884).

[7] Orne v. Friedenberg, 143 Pa. 487, 22 Atl. 832 (1901); Loud v. Pendergast, *supra* note 5; 2 HIGH, INJUCTIONS (4th ed. 1905) § 1159.

[8] Landell v. Hamilton, 177 Pa. 23, 35 Atl. 242 (1896); Note (1926) 74 U. OF PA. L REV. 312.

[9] Leaver v. Gorman, 73 N. J. Eq. 129, 67 Atl. 111 (1907); Hohl v. Modell, 264 Pa. 516, 107 Atl. 885 (1919).

[10] Schadt v. Brill, 173 Mich. 647, 139 N. W. 878 (1913).

laches.[11] On this ground the decision is a proper one, since after making one oral objection, the complainant remained silent about a year and a half concerning his rights and allowed the defendant to make expenditures and to incur liabilities.

PROPERTY—SUBTERRANEAN WATERS—DISTINCTION BETWEEN PERCOLATING AND FLOWING WATER—Plaintiffs, who had sunk wells to obtain water from an underlying artesian basin, sought an injunction to restrain defendants from boring more wells and thereby lessening the flow from plaintiffs' wells. An Idaho statute [1] provided that "the right to the use of waters of (public [2]) rivers, streams, lakes, springs, and subterranean waters may be acquired by appropriation." *Held* (one judge dissenting), that the defendants would be enjoined. *Hinton v. Little,* 296 Pac. 582 (Idaho 1931).

The early English case of *Acton v. Blundell,*[3] which decided that a landowner had an absolute right to the use of all subterranean water found under his land, was not popular. New York courts qualified the uses to which percolating water could be put.[4] Other states announced the "American" doctrine of correlative proportionate use.[5] In addition, almost all jurisdictions further limited *Acton v. Blundell* by holding that it applied only to water percolating through the ground without any certain or established course, and not to well-defined subterranean streams.[6] This distinction became so common that when Western courts were called upon to interpret their statutes regulating water rights, the majority [7] held that the right of "appropriation", that is, the right of the first user of water to have his supply uninterrupted by others, applied only to streams and not to percolating water. Idaho, however, departed from this rule in the present case and held that since there was some motion, more or less, in all subterranean water, the same law should be applied in both cases. If the best interests of an arid state are served by allowing the appropriation of running water, the same should be true of percolating water,[8] so it would seem that the Idaho court has reached the most practical conclusion. Furthermore the decision is certainly only a fair interpretation of the meaning of the statute. The dissenting judge bases his opinion on the proposition that water percolating beneath the ground is the private property of the landowner and is therefore not affected by the statute, which refers to public waters. There is, however, no reason why percolating waters should be more

[11] Whitney v. Union Rwy. Co., 11 Gray 359 (Mass. 1858); Soifer v. Stein, 101 Pa. Super. 135 (1931); 2 HIGH, *loc. cit. supra* note 7.

[1] Idaho Comp. Stat. (1919) 5558, Rev. Code 3242.

[2] Although the word "public" is not included in this section, the court apparently feels that it is meant, as other sections do include it, which are closely related to this section. Comp. Stat. (1919) 5569.

[3] 12 M. & W. 324 (1843).

[4] One is entitled to use percolating water for any beneficial purpose connected with the land itself. Smith v. Brooklyn, 18 App. Div. 340, 46 N. Y. Supp. 141 (1897).

[5] Katz v. Walkinshaw, 141 Cal. 116, 70 Pac. 663, *aff'd* 74 Pac. 766 (1903); Meeker v. City of East Orange, 77 N. J. L. 623, 74 Atl. 379 (1909); Schenk v. City of Ann Arbor, 196 Mich. 75, 163 N. W. 109 (1917).

[6] Tampa Waterworks Co. v. Cline, 37 Fla. 586, 20 So. 780 (1891); Clinchfield Coal Co. v. Compton, 148 Va. 437, 139 S. E. 308 (1927). This is the view of Pennsylvania, which holds that the doctrine of Acton v. Blundell does not apply to streams, and that it does not apply where the defendant has shown malice or negligence. Brown v. Kistler, 190 Pa. 499, 42 Atl. 885 (1899); Collins v. Chartiers Valley Gas Co., 131 Pa. 143, 18 Atl. 1012 (1890).

[7] Howard v. Perrin, 200 U. S. 71, 26 Sup. Ct. 195 (1905); McKenzie v. Moore, 20 Ariz. 1, 176 Pac. 568 (1918); Crescent Mining Co. v. Silver King Mining Co., 17 Utah 444, 54 Pac. 244 (1898). *Contra:* Bower v. Moorman, 27 Idaho 162, 147 Pac. 496 (1917); *cf.* Sullivan v. Northern Spy Min. Co., 11 Utah 438, 40 Pac. 709 (1895).

[8] Katz v. Walkinshaw, *supra* note 5, gives a very good criticism of the unsoundness of the English rule from an economic viewpoint.

private than a stream flowing under the same ground. It is no more a lasting part of the realty; both types of water flow freely from one position to another. To start with such a basis is really assuming what he has attempted to prove, that there is a distinction between percolating and flowing water.

TAXATION—CONSTITUTIONAL LAW—GIFTS CONCLUSIVELY DEEMED IN CONTEMPLATION OF DEATH—Plaintiff applied for a refund of taxes paid on gifts made within two years of the death of the donor. The tax was imposed under a section of the federal estate tax [1] which provides that certain transfers without consideration, made within two years before death, "shall be deemed in contemplation of death." *Held,* that the provision establishing this conclusive presumption was unconstitutional. *Hall v. White,* 48 F. (2d) 1060 (D. Mass. 1901).

In a number of recent district court cases [2] the constitutionality of this clause has been attacked and in each instance it was held unconstitutional. In *Schlesinger v. Wisconsin* [3] the Supreme Court of the United States, by a divided bench,[4] held a six year presumption to the same effect, an arbitrary classification of gifts *inter vivos* in violation of the "due process" clause of the Fourteenth Amendment.[5] In its majority opinion the Supreme Court did not mention the rather lengthy period of time within which this presumption operated as bearing on its decision, but some weight was no doubt attributed to it.[6] There can be little question that even under a two year statute gifts will be subject to the estate tax which were actually not made in contemplation of death. In the exercise of the police power, however, legislation has often been upheld the operation of which necessarily included innocent articles or transactions within the prescribed class.[7] A similar latitude should be granted to the exercise of the taxing power if, without being too arbitrary, it would aid in the proper administration of inheritance tax legislation. The great difficulty in proving that gifts are made in contemplation of death [8] is attested by the fact that ten states and the federal government found it necessary to pass laws establishing irrebuttable presumptions to that effect and

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[1] REVENUE ACT, 1926, § 302(c), 26 U. S. C. A. § 1094(c).

[2] Donnan v. Heiner, 48 F. (2d) 1058 (W. D. Pa. 1931); Estate of Henry A. Guinzberg, U. S. Daily, Aug. 4, 1931 at 1280; Delaware Trust Co. v. Handy (D. Del.) U. S. Daily, Sept. 2, 1931, at 1514; *cf.* State Tax Commission v. Robinson, 234 Ky. 415, 28 S. W. (2d) 491 (1930).

[3] 270 U. S. 230, 46 Sup. Ct. 260 (1926).

[4] Holmes, Brandeis, Stone, dissenting.

[5] § 1—". . . nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[6] "If the time were six months instead of six years I hardly think that the power of the state to pass the law would be denied, as the difficulty of proof would warrant making the presumption absolute; and while I would not dream of asking where the line should be drawn . . ., yet since we are dealing with a matter of degree, you must realize that reasonable men may differ widely as to the place where the line should be drawn." Holmes dissenting in Schlesinger v. Wisconsin, *supra* note 3.

[7] Purity Extract Co. v. Lynch, 226 U. S. 192, 33 Sup. Ct. 44 (1912); Silz v. Hesterberg, 211 U. S. 31, 29 Sup. Ct. 10 (1908). *Contra:* Weaver v. Palmer, 270 U. S. 402, 46 Sup. Ct. 320 (1926).

[8] In the case of Matter of Mills, 172 N. Y. App. Div. 530, 158 N. Y. Supp. 1100 (1916) gifts made by Mills when he was eighty-four years old and in failing health were held not in contemplation of death, although he died ten days later. In Matter of Spreckles, 30 Cal. App. 363, 158 Pac. 549 (1916) gifts made by a seventy-nine year old woman, suffering from a dangerous heart disease, were held not in contemplation of death, although she died a month later.

seventeen others passed legislation establishing rebuttable presumptions.[9] The judgment of such a number of legislative bodies should not be overlooked in determining the constitutionality of statutes setting up presumptions of contemplation of death.[10]

TAXATION—SITUS OF STOCK OWNED BY NON-RESIDENTS—A Minnesota statute [1] imposed a transfer tax on stock of corporations of that state whether owned by residents or non-residents. Decedent died a resident of Wisconsin owning stock in Minnesota corporations. His administrators petitioned to have this stock exempted from the tax. *Held,* that the petition should be denied since the situs of the property interest represented by the stock was still within the jurisdiction of Minnesota.[2] *Benson v. State,* 236 N. W. 626 (Minn. 1931).

A long line of both state [3] and federal [4] decisions sanctioned a transfer tax on stock of domestic corporations owned by non-residents. The recent case of *Farmers' Loan and Trust Co. v. Minnesota,*[5] however, decided that such a tax on bonds was a violation of the Fourteenth Amendment [6] because the situs of the bonds was at the domicile of the creditor [7] under the maxim *mobilia sequuntur personam.*[8] The argument stressed by the court was the economic evil of double

[9] Conclusive presumptions were established in: Ariz., Ark., Colo., Ky., Miss., Mo., N. C., N. D., Tenn., Wis. Rebuttable presumptions in the following: Conn., Del., Ga., Ind., Kan., La., Mass., Mich., Mont., N. J., N. Y., Ohio, S. C., Utah, Va., W. Va., Wyo. PINKERTON & MILLSAPS, INHERITANCE AND ESTATE TAXES (1926) § 139.

[10] An appeal on the instant case is now pending. FEDERAL & NEW YORK STATE INCOME AND INHERITANCE TAXES AFFECTING ESTATES AND TRUSTS, July Supp. 7 (1931).

[1] MINN. STAT. (1 MASON 1927) §§ 2292, 2302.

[2] For a discussion of the theories of a stock transfer tax refer to Note (1925) 38 HARV. L. REV. 809. But see Rhode Island Hospital v. Doughton, 270 U. S. 69, 46 Sup. Ct. 256 (1926).

[3] Matter of Bronson, 150 N. Y. 1, 44 N. E. 707 (1896); Greves, Exr. v. Shaw *et al.,* 173 Mass. 205, 53 N. E. 372 (1899); McDougald v. Lilienthal, 174 Cal. 698, 164 Pac. 387 (1917). The stock has even been considered subject to the tax when the deceased has pledged it as collateral security for a loan with a creditor outside the taxing state where the question was whether the will transferred the stock itself or only a right to redeem it. Matter of Hallenbeck, 231 N. Y. 409, 132 N. E. 131 (1921); Security Trust Co. v. Edwards, 90 N. J. L. 558, 101 Atl. 384 (1917); Larson v. MacMiller, 56 Utah 84, 189 Pac. 579 (1920). The fact that a corporation was chartered in two states did not relieve the stock owned by a decedent in a third state from a transfer tax. Moody v. Shaw, 173 Mass. 375, 53 N. E. 891 (1899). Some cases seem to hold otherwise but they can be distinguished on the grounds of the reciprocity clauses of exemption incorporated in the statutes. Bliss v. Bliss, 221 Mass. 201, 109 N. E. 148 (1915); Kansas v. Davis, 88 Kan. 849, 129 Pac. 1197 (1913).

[4] Tappan v. Merchants National Bank, 86 U. S. 490 (1873); Corry v. Baltimore, 196 U. S. 466, 25 Sup. Ct. 297 (1905); Hawley v. Malden, 232 U. S. 1, 34 Sup. Ct. 201 (1914).

[5] 280 U. S. 204, 50 Sup. Ct. 98 (1930) [overruling Blackstone v. Miller, 188 U. S. 189, 23 Sup. Ct. 277 (1903)]. See Note (1930) 15 CORN. L. Q. 457. See also Baldwin v. Missouri, 281 U. S. 586, 50 Sup. Ct. 436 (1930); (1930) 79 U. OF PA. L. REV. 99.

[6] A state may not tax property beyond its jurisdiction. State Tax on Foreign Held Bonds, 82 U. S. 300 (1872); Louisville & Jeffersonville Ferry Co. v. Kentucky, 188 U. S. 385, 23 Sup. Ct. 463 (1903); Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194, 26 Sup. Ct. 36 (1905). For recent developments see NOSSAMAN, *The Fourteenth Amendment in its Relation to State Taxation of Intangibles* (1930) 18 CALIF. L. REV. 345; Note (1926) 74 U. OF PA. L. REV. 73; Note (1930) 78 U. OF PA. L. REV. 532.

[7] Quoting from the case of State Tax on Foreign Held Bonds, *supra* note 6, ". . . debts can have no locality separate from the parties to whom they are due". See dissenting opinion of Justices Holmes and Brandeis; Note (1930) 9 ORE. L. REV. 370; GOODRICH, CONFLICT OF LAWS (1926) 85.

[8] Note (1930) 78 U. OF PA. L. REV. 532, 536; POWELL, *Extra-Territorial Inheritance Taxation* (1920) 20 COL. L. REV. 1, 283, 300 *et seq.* Powell suggests that where the application of this maxim would result in double taxation it is disregarded. See Southern Pacific Railway v. Kentucky, 222 U. S. 63, 32 Sup. Ct. 13 (1911).

taxation.[9] It was contended in the principal case that this same reasoning applied to stocks also. Such would seem to be the case, but it is well settled that there is a fundamental difference between a corporate bond and a share of stock,[10] based on the fact that the corporation is a creature of the state subject to the right of the state to impose on the stockholders, whether residents or non-residents, the duty of paying taxes on the transfer of the stock as a condition to becoming stockholders.[11] Bondholders are merely creditors whose only interest is in the payment of an obligation, while stockholders own undivided interests in corporate property. Granted that the stock is taxable at the situs of the corporation, the argument of multiple taxation may be directed against a tax imposed by the state where the owner is domiciled, but it is fundamental that the situs of such intangibles is at the domicile of the owner with respect to which he must contribute to the support of the government whose protection he enjoys.[12] It is therefore suggested that since the right of the state of incorporation and of the domicile of the owner is well established on sound legal bases,[13] double taxation of capital stock will not soon be eliminated.

TORTS—LIBEL—DICTATION TO STENOGRAPHER AS PUBLICATION—One count in an action for libel and slander alleged that defendant dictated a letter, accusing plaintiff of larceny, to his stenographer, who read and transcribed the notes; and that the letter was mailed to plaintiff. Defendant pleaded that the count did not state a cause of action for libel. *Held* (three judges dissenting), that the facts alleged were sufficient to constitute a cause of action for libel. *Ostrowe v. Lee,* 256 N. Y. 36, 175 N. E. 505 (1931).

A leading English case, *Pullman v. Hill,*[1] held that the dictation of defamatory matter to a stenographer effected the actionable publication of a libel. A later case created the distinction that where the communication would be privileged if made directly to the addressee by the person dictating, the privilege covers its dictation to a stenographer in the usual course of business.[2] This case has been repeatedly followed [3] and, with *Pullman v. Hill,* represents the English law.

[9] The court reasoned that the general principles which prohibited taxation of tangibles except where they are located applied equally well to intangibles. It went on to state that because of the national scale of business and the enormous increase in the investment of wealth of negotiable securities that such interests should be protected from oppressive taxation. It is suggested that the legal ground for the decision was the concurring opinion of Justice Stone who declared the tax in question was a tax on the act of transfer which could only be done where the decedent was domiciled, and that no state could impose such a tax except where the act was done.

[10] Matter of Bronson, *supra* note 3.

[11] Corry v. Baltimore; Tappan v. Merchants National Bank, both *supra* note 4; Beale, *Jurisdiction to Tax* (1919) 32 HARV. L. REV. 587, 602. There are, however, several cases where the distinction between bonded indebtedness and shares of stock in a corporation owned by non-resident of the taxing state was overlooked. Gilbertson v. Oliver, 129 Iowa 568, 105 N. W. 1002 (1906); Kintzing v. Hutchinson, Fed. Cas. #7834 (1877).

[12] Hawley v. Malden, *supra* note 4; Wright v. Louisville & N. R. Co., 195 U. S. 219, 25 Sup. Ct. 16; see So. Pac. v. Ky., 222 U. S. 63, 68, 32 Sup. Ct. 13, 15 (1911); COOLEY, TAXATION (4th ed. 1924) § 462.

[13] *Supra* note 2.

[1] [1891] 1 Q. B. 524.

[2] Boxsius v. Goblet Fréres, [1894] 1 Q. B. 842. In this case, the defendant was a solicitor, and the Court held that, as such, it was part of his duties to write defamatory letters at the request of his clients, and customary for solicitors to use stenographers in so doing. The fact that stenographers are required by their employers to keep such matters confidential was probably a factor in the decision.

[3] Edmonston v. Birch & Co., [1907] 1 K. B. 371; Roff v. British & French Chem. Mfg. Co., [1918] 2 K. B. 677; Osborn v. Thomas Boulter & Son, [1930] 2 K. B. 266. Note (1902) 22 CAN. L. T. 321.

In the instant case, this question of privilege was not raised. The leading American case, *Gambrill v. Schooley,*[4] adopted the rule in *Pullman v. Hill* and has been followed in several jurisdictions.[5] A large number of American cases, however, have held that where the person dictating and the recipient of the dictation are both servants, or agents, of a corporation, acting within the scope of their employment, the transaction is a "single act" of the corporate body, and does not constitute a publication by the corporation.[6] Although some authorities maintain that the dictation effects the publication of a slander, and not of a libel,[7] the courts, on the whole, have ruled that it does publish a libel.[8] It was the opinion of the Court in the instant case that the libel was not published until the stenographer read over the notes.[9] It would seem to follow, therefore, that if the stenographer, after taking dictation, neither read nor transcribed the notes, the wrong would not be a libel.[10] It is certain, however, that the instant case has given greater significance to the advice of Esher, M. R., in *Pullman v. Hill,* which was cited with approval, "If a merchant wishes to write a letter containing defamatory matter, and to keep a copy of the letter, he had better make the copy himself."

TORTS—PROXIMATE CAUSE—CARRIER'S DUTY TO FORESEE INTERVENING, INDEPENDENT, WRONGFUL ACT OF A PASSENGER—Plaintiff's son was killed when a defective coupling joining the defendant's cars broke. The severance was caused by another passenger who, while crawling through a transom above a door, inadvertently applied the air brake. *Held,* that the negligence of defendant in failing to inspect and remedy the defective coupling was the proximate cause of the boy's death. *Gulf, C. & S. F. Ry. Co. v. Ballew et ux.,* 39 S. W. (2d) 180 (Tex. 1931).

Those courts which apply the foreseeability test to the question of proximate cause, as the court did in the principal case, have repeatedly held that the inter-

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[4] 93 Md. 48, 48 Atl. 730 (1901).

[5] Nelson v. Whitten, 272 Fed. 135 (E. D. N. Y. 1921); Ferdon v. Dickens, 161 Ala. 181, 49 So. 888 (1909); Sun Assurance Co. of Can. v. Bailey, 101 Va. 443, 44 S. E. 692 (1903). But *cf.* Globe Furniture Co. v. Wright, 265 Fed. 873 (D. C. 1920). (1921) 70 U. OF PA. L. REV. 133.

[6] Owen v. Ogilvie, 32 App. Div. 465, 53 N. Y. Supp. 1033 (1898) (the leading case); Central of Ga. R. Co. v. Jones, 18 Ga. App. 414 (1916); Cartwright-Caps Co. v. Fischel & Kaufman, 113 Miss. 359, 74 So. 278 (1917). *Contra:* Berry v. City of N. Y. Ins. Co., 210 Ala. 369, 98 So. 290 (1924); Sun Assurance Co. of Can. v. Bailey, *supra* note 5. The same result could have been achieved in these cases, presumably, if the rule in Boxsius v. Goblet Fréres, *supra* note 2, had been applied.

[7] ODGERS, LIBEL & SLANDER (4th ed. 1904) 154; SALMOND, TORTS (7th ed. 1928) 530. "It is difficult to see how *A* can publish to *B* a document which is written by *B* himself." SALMOND, *ibid.* In the instant case, Cardozo, C. J., says of this reasoning, 256 N. Y. at 39, 175 N. E. at 505, "The criticism would be just if *B* were the author of the document, or wrote it of his own volition."

[8] Pullman v. Hill, *supra* note 1; Boxsius v. Goblet Frères, *supra* note 2; Gambrill v. Schooley, *supra* note 4. *Contra:* Angelini v. Antico, [1912] 31 N. Z. 841; see Osborn v. Boulter, *supra* note 3, at 237. In the instant case the Court ruled that the stenographer served merely as "an instrument to give existence to the writing" composed and dictated by the defendant, and that the libel was published just as surely as if the defendant himself had written the notes and given them to the stenographer to read and transcribe.

[9] At 38, 175 N. E. at 505. "Publication there still is as a result of the dictation, at least where the notes have been examined or transcribed."

[10] This would, presumably, effect the publication of a slander if the stenographer grasped the significance of the statement during dictation. However, as the Court sugested at 39, 175 N. E. at 506, "Very often a stenographer does not grasp the meaning of the dictated words until the dictation is over and the symbols have been read." Of course, if the stenographer did not read the notes, nor understand the defamatory significance of the dictation, neither a libel nor a slander would be published.

vening,[1] independent,[2] wrongful[3] act of a third person does not relieve the first wrongdoer of liability, where such act was foreseeable.[4] In one case where a motorman negligently left a street car unguarded upon an incline, the release of the brake by a passenger was held to be foreseeable and thus, not destructive of the chain of causation.[5] Here, the interference by the passenger was one of the very risks involved in the motorman's conduct.[6] But in the absence of other proof of negligence the sudden application of an air brake,[7] or the unhooking of a coupling,[8] or the swinging of a brake handle[9] by a passenger has been held to be unforeseeable. Thus on the basis of these cases, if the release of the air brake alone had caused the injury in the principal case, there would have been no liability because such act was unforeseeable.[10] Consequently in applying the foresight test to causation in the instant case, logic would compel one to admit that the passenger's act could not have been foreseen, thus destroying the chain of causation. Obviously, this is an undesirable conclusion and the court avoided it by reasoning that the *application* of the air brake was foreseeable and that it was not necessary to foresee the *wrongful* application. In effect this is really deciding the issue of negligence and not of cause, and has been a familiar expedient in circumventing the foreseeability rule when applied to causation.[11] It would seem to be better to employ the method that several writers and many cases

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[1] The court in the principal case called the application of the air brake by the passenger a "concurrent" cause. Such a use of the phrase is either supported by the fiction that the defendant's negligence in failing to inspect and remedy the defective coupling continued up unto the very moment of the injury; or else, it is used as a word of art to denote a cause which creates joint liability. It seems more logical, however, to say that defendant's failure to inspect and remedy was antecedent negligence creating a condition upon which the third person's intervening act operated to produce the injury. The distinction is important in differentiating the situation in the instant case from that: (a) where the two acts operate together, in point of time, to produce the injury, and (b) where the third party's act precedes the defendant's negligence, as in the case where a passenger dislodged a trolley pole, and the motorman attempted to replace it without giving warning to another car coming around a curve. Blanchette v. Holyoke Ry. Co., 175 Mass. 51, 55 N. E. 481 (1899).

[2] An independent, intervening act as distinguished from a dependent act, is one which is not in response to a previous act or condition created by another. It is more difficult to foresee an independent, intervening act since a dependent act is more likely to be the very risk involved in the defendant's antecedent negligence. Kliebenstein v. Iowa Ry. & Light Co., 193 Ia. 892, 188 N. W. 129 (1922).

[3] Whether or not the application of the brake, in the principal case, was wrongful, presents an interesting question. Since the third party, at the time he pulled the brake cord, was in a part of the train where he had no privilege to be, his status was that of a trespasser. And as such it would seem that anything done by him, even though accidentally, was still wrongful.

[4] Gonzales v. City of Galveston, 84 Tex. 3, 19 S. W. 284 (1892); Lane v. Atlantic Works, 111 Mass. 136 (1872).

[5] Kliebenstein v. Iowa Ry. & Light Co., *supra* note 2.

[6] *Supra* note 2.

[7] McDonnell v. N. Y. C. & H. R. R. Co., 54 N. Y. S. 747 (1898).

[8] Texas & P. Ry. Co. v. Storey, 37 Tex. Civ. App. 156, 83 S. W. 852 (1904).

[9] Sure v. Milwaukee Ry. & Light Co., 148 Wis. 1, 133 N. W. 1098 (1912).

[10] To hold otherwise would require a carrier to place such safeguards around its emergency air brakes as would render them ineffective for the very purpose for which they were installed, namely, to be applied by the proper employees when a quick stop was necessary.

[11] "One of the most usual means of obviating this test is to say that the exact consequences do not have to be foreseen, but only harm in general. Strange to say, few courts have seen any inconsistency in making such a substitution. . . . What the courts actually do when they make this switch is to abandon foreseeability as a test of causal relation altogether and to fall, back upon the issue of negligence for which the general foreseeability test is properly used." Green, *Are Negligence and "Proximate" Cause Determined by the Same Test?* (1922) 1 TEX. L. REV. at 443.

have suggested, namely, that foresight determines the existence of negligence and that the causal relation is a matter of fact for the jury.[12]

TRUSTS—PRECATORY WORDS—DIRECTIONS TO EMPLOY—A petition was brought to construe a will. The will, after establishing a trust, stated, *inter alia,* "It is my desire that my present housekeeper continue as such for my son." *Held,* that although no trust existed in favor of the housekeeper, the guardian must continue her status as long as possible. *In re Platt's Will,* 237 N. W. 109 (Wis. 1931).

Where precatory language is employed courts are generally confronted with the problem of whether the particular words give rise to a trust or whether they merely express a wish.[1] Situations are rarer where precatory language is used to direct the administration of an expressed trust,[2] as in the instant case where the precatory words were used in connection with a direction to employ. Testamentary directions to employ have been grouped into three categories: (1) mere recommendations; (2) express directions; and (3) express directions primarily intended for benefit of the designated person.[3] Mere recommendations are not binding [4] and even mandatory instructions are not construed to give the designated individual power in his own right to compel employment where he is only an incidental beneficiary.[5] And in cases falling under the third class only two instances have been encountered where the courts compelled the trustee to employ.[6] Aside from the special reasons applicable in cases involving the appointment of attorneys,[7] this fact may be attributed to the infrequent use of clearly mandatory language to employ [8] and the hesitancy of courts to give mandatory

[12] Bohlen, *The Probable and Natural Consequences as the Test of Liability in Negligence* (1901) 49 U. OF PA. L. REV. 79; Green, *op cit. supra* note 11, 243-60, 423-45; GREEN, RATIONALE OF PROXIMATE CAUSE (1927) especially pp. 177-85.

[1] In the absence of something in the terms of the will from which the court ought to infer that a trust is intended, precatory words are generally interpreted only in their ordinary sense. *In re* Humphrey's Estate (1916) 1 Ir. R. 21; Estate of Browne, 175 Cal. 361, 165 Pac. 960 (1917). *Contra:* Deacon v. Cobson, 83 N. J. Eq. 122, 89 Atl. 1029 (1914); *In re* Hochbrunn's Estate, 138 Wash. 415, 244 Pac. 698 (1926).

[2] Precatory language has been sufficient to direct the sale of real estate, Appeal of the City of Philadelphia, Trustee, 112 Pa. 470, 4 Atl. 4 (1886); to effectuate a gift, Mosley v. Bolster, 201 Mass. 135, 87 N. E. 606 (1909); to direct the investment of a trust, Stewart v. Stewart, 61 N. J. Eq. 25, 47 Atl. 633 (1900).

[3] Scott, *Testamentary Directions to Employ* (1928) 41 HARV. L. REV. 709.

[4] Shaw v. Lawless, 5 Cl. & Fin. 129 (Eng. 1838); Finden v. Stephens, 2 Ph. 142 (Eng. 1846); Colonial Trust Co. v. Brown, 105 Conn. 261, 135 Atl. 555 (1926); *In re* Will of Pittock, 102 Ore. 159, 199 Pac. 633 (1921).

[5] Scott, *op. cit. supra* note 3, at 713; see Shaw v. Lawless, *supra* note 4, at 155.

[6] Hibbert v. Hibbert, 3 Mer. 681 (Eng. 1808); Williams v. Corbet, 8 Sim. 349 (Eng. 1837).

[7] There is no testamentary power to control the trustee or executor in the choice of their attorneys. *In re* Ogier, 101 Cal. 381, 35 Pac. 900 (1894); Matter of Caldwell, 188 N. Y. 115, 80 N. E. 663 (1907). *Contra:* Rivet v. Battistella, 167 La. 766, 120 So. 289 (1929). The reason for the general holding is to be found in the fact that when an attorney is employed to render services in procuring the admission of a will to probate, or in settling the estate, or in advising the trustee, he acts as the attorney of the executor or trustee and not of the estate, and this personal relationship with its attaching liabilities cannot be imposed by the testator.

[8] But if the testator, clearly for the benefit of the designated person, demanded his employment as long as the services were satisfactorily rendered, it seems the court should grant a decree for specific performance, although it has been argued in Scott, *Control of Property by the Dead* (1917) 65 U. OF PA. L. REV. 527, 632, 651, that it might well be against public policy to permit the deceased to hamper the administration of an estate.

significance to precatory directions to employ.[9] The court in the principal case held that although the housekeeper was only an incidental beneficiary it would nevertheless require the guardian to continue her status as long as it was to the best interests of the son who was the primary beneficiary, on the ground that the testator's intention that his precatory language have mandatory effect should be carried out.[10] The case in result appears to go a step beyond the present line of decisions, for there has been a marked tendency to give precatory words only their natural meaning, both in instances like the present, and in cases where the precatory language attempts to create a trust.[11] It would appear, however, that the courts may with less compunction determine that precatory language was intended as an absolute direction, than to determine that precatory words were intended to cut down a definitely expressed prior bequest and thereby set up a whole series of new legal relations.

WILLS—STATUTE OF LIMITATIONS—DEDUCTION OF DEBT FROM LEGACY—The decedent, by his will, gave his property to his nine children, share and share alike. The estate included three unpaid promissory notes against three children,—to which the Statute of Limitations could be pleaded. *Held,* that the debts of the legatees were deductible from their distributive shares. *In re Lindmeyer's Estate,* 182 Minn. 607, 235 N. W. 377 (1931).

An actionable debt owing by a legatee to the decedent is deductible from the distributive share of such legatee.[1] On the question whether a debt on which suit has been barred by the Statute of Limitations can be deducted, the courts are divided. The English rule,[2] which has been adopted in a majority of the states,[3] allows it to be deducted on the theory that the statute bars only the remedy and not the debt itself.[4] In the instant case the court asserts that it is inequitable to let the distributee get his full share when he is already holding part, because he thus unfairly diminishes the other shares. Whether or not this is inequitable rests on a deeper question, rarely discussed by the courts,—what is the intent of the decedent?[5] It is uniformly held, as pointed out above, that testators do not

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[9] In the following cases the courts held that the testamentary expressions were not mandatory directions: Jewell v. Barnes' Adm'r, 110 Ky. 329, 61 S. W. 360 (1901) ("I desire"); *In re* Will of Pittock, *supra* note 4 ("It is my wish . . . it is my request"); Finden v. Stephens, *supra* note 4 ("My wish and desire"); Shaw v. Lawless, *supra* note 4 ("It is my particular desire that"); Foster v. Elsley, 19 Ch. D. 518 (Eng. 1881) ("I declare that").

[10] It would seem that by compelling the housekeeper's employment the court forces a personal relationship on the child, but the decision is not to be criticized on this score for the testator's right to appoint a housekeeper or governess for his child should be as uncontroverted as his right to name a guardian for the child.

[11] 1 PERRY, TRUSTS AND TRUSTEES (6th ed. 1929) par. 114; *In re* Humphrey's Estate, *supra* note 1; and cases collected, *supra* note 9.

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[1] Brokaw v. Hudson's Ex'rs, 27 N. J. Eq. 135 (1876); Sharp v. Wightman, 205 Pa. 285, 54 Atl. 888 (1903).

[2] Courtenay v. Williams, 3 Hare 539 (Eng. 1844); Rose v. Gould, 15 Beav. 189 (Eng. 1852); Coates v. Coates, 33 Beav. 249 (Eng. 1864).

[3] Holmes v. McPheeters, 149 Ind. 587, 49 N. E. 452 (1898); Lietman's Ex'r v. Lietman, 149 Mo. 112, 50 S. W. 307 (1899); Armour v. Kendall, 15 R. I. 193, 2 Atl. 311 (1885). *Contra:* Allen v. Edwards, 136 Mass. 138 (1883); Holt v. Libby, 80 Me. 329, 14 Atl. 201 (1888); Light's Estate, 136 Pa. 211, 20 Atl. 536 (1890).

[4] For a discussion of this phase of the case, see note on the principal case in (1931) 15 MINN. L. REV. 590.

[5] In Holt v. Libby, *supra* note 3, at 332, 14 Atl. at 202, the court did stress intention: "Observation leads us to believe that a testator is more likely to intend to remit than to collect such debts, when nothing is declared of them in his will, especially debts against his children and relatives. In many instances such claims are covered by the dust of time and forgotten, though found by executors after the death of the testator."

intend, by legacies to debtors, to release actionable debts.[6] If the evidence shows that in the particular testator's mind, the barrable debt was regarded as an actual indebtedness, the courts, to be logical, should carry out their rule of construction of intention, and hold the debt deductible. If the evidence shows that the debt was not regarded as an actual one, the opposite result should be reached.[7] The proximity of the date of the debt to the date of the will may aid in determining the intention of the decedent.[8] In the absence of evidence, it seems that the courts should be guided by the attitude of the ordinary testator. It therefore seems that the rule to be applied should be based on the reasonable intention of the testator, and should not merely be based on the Statute of Limitations since that is a statute of policy and not of intention.

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[6] Brokaw v. Hudson's Ex'rs, Sharp v. Wightman, both *supra* note 1.

[7] For example, if the will was made long after the debt has become barrable, the decedent has either forgotten the debt, or remembering it, has failed to mention it in his will. In either case, it appears probable that he did not intend to have the debt deducted.

[8] Holt v. Libby, *supra* note 3.